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Attorneys for Defendants CITY OF REDWOOD CITY;  
JAIME MATEO and DAVID GOUGH

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DOUGLAS BURNS, Individually,

Plaintiff,

vs.

CITY OF REDWOOD CITY, a public entity;  
REDWOOD CITY POLICE DEPARTMENT;  
POLICE OFFICER JAIME MATEO; POLICE  
OFFICER DAVID GOUGH; POLICE  
OFFICER RAMIRO PEREZ; POLICE  
OFFICER STEPHEN SYSUM; POLICE  
OFFICER RICH HARRINGTON, individually,  
and DOES 1-10,

Defendants.

Case No. C08-02995 RS

**DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S MOTION IN LIMINE NO. 6  
TO EXCLUDE DEFENDANTS' EXPERT  
HEATHER XITCO, HER OPINIONS AND  
HER EXHIBITS**

**JUDGE: Hon. Richard Seeborg**  
**TRIAL: May 31, 2011**

**I. INTRODUCTION**

Defendants, CITY OF REDWOOD CITY, JAIME MATEO and DAVID GOUGH, file this memorandum in opposition to plaintiff's sixth motion in limine to exclude the testimony of defendants' expert Heather Xitco, her opinions and her exhibits.

Heather Xitco is a CPA qualified to analyze Burns' claimed income loss.

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## II. FACTS

Heather Xitco's qualifications to testify as an expert on plaintiff's claimed income loss are set forth in her Rule 26 disclosure expert report. *See* Exhibit R to Declaration of Gina Altomare in Support of Plaintiff's Motions in Limine ("Altomare Dec.") [Doc. 120-18]. Exhibit B to Xitco's report lists the cases in which she has qualified as an expert on the subject of economic loss between May 1, 2006 and April 12, 2010. *See* Exhibit R to Altomare Dec. page 2, ¶ 3 [Doc. 120 - 18 p. 2 of 19] and [Doc. 120 - 18, pp 13 - 16 of 19.]

Explaining why it is her opinion that plaintiff's expert's opinion of wage loss is speculative, Xitco notes the lack of documentation to support Burns' wage loss claims. At page 3 of Exhibit R, Xitco discloses that plaintiff has documented income of \$1,500 in 2006 \$7,200 in 2007 and \$21,018 in 2008. She notes that that documentation does not support plaintiff's interrogatory responses which claimed income in 2006 at \$76,600, \$50,148 in 2007 and \$16,253 in 2008. *Id.* at p. 3 [Doc. 120 - 8 p. 3 of 19.]

At deposition, she pointed out readily available sources by which Burns could establish his income with documentation: Social Security statements, tax returns, documents from employers or payors including pay stubs, 1099s, and W-2s. (Xitco Deposition, Exhibit Q to Altomare Dec. at 30:5-22, [Doc. 120-17 at p. 9 of 17]. She testified that it was her practice to request that type of documentation in the normal course of evaluating economic damages. *Id.* at 31:16-22. It is Xitco's conclusion that absent that kind of documentation and in view of the documentation that actually exists, there is no foundation for plaintiff's economist to assume a past and future income loss in the amount of \$612,693. She supports her opinion regarding wages and earnings with documentation from the California Employment Development Department. *See* Exhibit Q to Altomare Dec. at 43:10-14 [Doc. 120-17 at p. 12 of 17].

Likewise, Xitco found no basis for plaintiff's expert to assume a \$200,000 loss in a business opportunity that had an 80% chance of failure. *See* Exhibit R to Altomare Dec. at pp. 6 - ,

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1 16 [Doc. 120 – 18 at pp 6 – 7 of 19; *see also* Defendants' Motion in Limine 2 to exclude the  
2 alleged loss of income from the internet start-up business.

### 3 **III. ARGUMENT**

4 Xitco will testify with regard to her analysis of the past and future wage loss claims and the  
5 methods and materials used by professionals to analyze these types of claims. She will not testify  
6 as to medical issues or Burns ability to work. She will testify what Burns could earn at various  
7 jobs based on data from the California Employment Development Department and other relevant  
8 sources.

9 Whether an economist should rely solely on Burns sworn testimony and interrogatory  
10 answers, rather than available documentation is an issue for the jury to decide and not an opinion  
11 that she will offer. She can testify as to what she would or would not rely on and why, and the  
12 availability of sources of information which would allow a party to document a claimed income  
13 loss.

14 Plaintiff's counsel was provided Ms. Xitco's complete file including a binder at the time of  
15 her deposition. *See* Exhibit Q to Altomare Dec at pp., 6:14-7:22; 11:24 [Doc. 1120 – 17 at pp 3 – 4  
16 of 17]. Her file contained her exhibits that defendants intend to introduce at trial. Plaintiff's  
17 counsel looked at the binder but did not ask to copy it.

18 Defendants' Exhibit 251 is a simple graph of Burns' documented income, claimed income  
19 and plaintiff's own economist Allman's calculated income loss on one page for ease of explanation  
20 to the jury. All of the information on that graph came from Allman's and plaintiff's discovery  
21 responses. There is nothing new in the chart.

22 Defendants' Exhibit 252 is chart the explains the calculation of the discount rate and the  
23 different amounts derived over a period of 16 years using factors of 1.4% and 2.5%. It puts a  
24 simple mathematics calculation into an understandable concept.

25 Defendants' Exhibit 253 is a listing of Burns' income prepared by Xitco from documents  
26 supplied by Burns. There is no new information. These documents will assist the jury in

1 understanding the income loss claim and will lessen the time it will take to present testimony in  
2 that regard.

3 **IV. CONCLUSION**

4 Plaintiff's motion to disqualify Xitco, her opinions and exhibits has no basis and should be  
5 denied.

6 DATE: May 9, 2011

7 HOWARD ROME MARTIN & RIDLEY LLP

8  
9 By: /s/ JOSEPH C. HOWARD, JR.  
10 Joseph C. Howard, Jr.  
11 Melissa M. Holmes  
12 Attorneys for Defendants CITY OF  
13 REDWOOD CITY; JAIME MATEO and  
14 DAVID GOUGH  
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